No. 81-1735

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOE G. GARCIA,

Appellant,

vs.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION,

Appellees.

REPLY BRIEF IN RESPONSE TO THE MOTIONS TO AFFIRM OF THE SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION AND IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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I.

INTRODUCTION

Appellees, San Antonio Metropolitan Transit Authority (hereinafter, "SAMTA") and American Public Transit Association (hereinafter, "APTA"), have filed separate Motions to Affirm. There, they contend that this case is appropriate for summary disposition by this Court. (SAMTA Motion, at 1; APTA Motion, at 1). In light of this Court's recent decision in *United Transportation Union* v. *Long Island Rail Road*, —— U.S. ——, 50 U.S.L.W. 4315 (Apr. 24, 1982) (No. 81-1925) (hereinafter, *"Transportation Union"*), wherein this Court refused to extend its decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), to bar application of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, to a commuter transportation system, and in light of the conflict with the federal courts resulting from the Third Circuit's decision in *Kramer* v. *New Castle Area Transit Authority*, —— F. 2d ——, No. 2223 (3rd Cir. Apr. 30, 1982) (hereinafter, *"Kramer"*), on the very same issue before this Court, Appellees' contention

that this case is appropriate for summary disposition has no merit. As the length and content of their motions demonstrate, Appellees have presented arguments on the merits, which, in and of themselves, show the need for this Court's plenary review.[1] Accordingly, Appellant will limit himself to the issue which this Court must now decide: whether summary affirmance of the district court's decision could possibly be appropriate in view of the issue of national importance presented here, the recent decision of this Court in *Transportation Union* and the Court of Appeals in *Kramer*, and the strength of Appellant's position on the merits.

II.

ARGUMENT

This case comes on direct appeal from the ruling of the United States District Court for the Western District of Texas holding unconstitutional and enjoining enforcement of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ((hereinafter, "FLSA"), as it applies to employees of publicly owned mass transit systems. At the instance of Appellee APTA, the district court restrained Appellant Secretary of Labor Donovan from such enforcement anywhere in the United States (Appendix, 2a); accordingly, the question before this Court is not merely the Tenth Amendment immunity for the San Antonio Metropolitan Transit Authority, but for all mass transit. Thus, the national importance of the questions presented on appeal is obvious.

A.

The Ruling on Appeal Conflicts With the Decision of the Only Circuit to Rule on the FLSA's Application to Mass Transit.

Immediately after this Court unanimously reversed the ruling in *Transportation Union*, the United States Court

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1. Appellees' Motions to Affirm total some 58 pages. In the ten pages allotted for this Reply Brief, Appellant cannot respond fully to Appellees' argument on the merits, nor their presentation of the facts, including "facts" which appear nowhere in the record of this case. See, *infra* at 7, n. 9, and SAMTA Motion, at 4, n. 4.

of Appeals for the Third Circuit unanimously reversed the district court decision in *Kramer*, on the strength, *inter alia*, of *Transportation Union*.[2] Thus, the decision here is in direct conflict with the ruling of the only court of appeals to rule on the subject so far.[3] Three other cases are pending before courts of appeals, *Alewine* v. *City Council of Augusta*, 505 F. Supp. 880 (S.D. Ga. 1981), *appeal docketed*, No. 81-7490 (11th Cir. June 5, 1981); *Joiner* v. *City of Macon*, No. 79-287-MAC (M.D. Ga. April 27, 1981), *appeal docketed*, No. 81-7789 (11th Cir. September 30, 1981), *consolidated with, Alewine, supra; Dove* v. *Chattanooga Area Regional Transportation Authority*, No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed*, No. 81-5636 (6th Cir. Sept. 30, 1981).[4]

Certainly, at the very least, this Court's reversal of the Second Circuit's ruling in *Transportation Union*, the conflict with *Kramer*, and the pendency of further conflicting litigation in two other Circuits warrant full briefing and oral argument on the merits here.

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2. In seeking this Court's summary affirmance, without briefs on the merits or oral argument, of the district court's nullification of this federal statute, neither Appellee addresses the Third Circuit's application of *Transportation Union* in *Kramer* and its application here. Indeed, Appellees barely acknowledge the existence of *Kramer*, the most recent and only appellate decision directly on point, each burying *Kramer* in a footnote purporting to describe the state of the precedent as "a majority of courts" favoring Appellees' position on the merits. (SAMTA Motion, at 4; APTA Motion at 15, n. 25). Appellees' disingenuous efforts to hide *Kramer* serve only to emphasize the inappropriateness of the issue for the summary action Appellees propose..

3. As set forth in Appellant Garcia's Supplemental Brief in Support of Jurisdictional Statement (hereinafter, "Supp. Br."), at 2, 3, the decision here and the other lower court opinions are inextricably intertwined with the now reversed decision of the Court of Appeals in *Transportation Union*, 634 F. 2d 19 (2nd Cir. 1980).

4. Just recently, the Appellant City of Macon filed a brief with the United States Court of Appeals for the Eleventh Circuit in *Joiner* acknowledging that this Court's ruling here might well dispose of *Joiner*.

B.

Appellees' Proposed Construction of *Transportion Union* Cannot Serve As A Basis for Summary Affirmance.

In *Transportation Union*, this Court held that, before application of a federal regulation may be struck down as directly impairing the state's ability to structure integral operations in areas of traditional governmental functions, *National League of Cities* "require[s] an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely *to hamper the state government's ability to fulfill its role in the Union* and *endanger its 'separate and independent existence.'* [*National League of Cities*, 426 U.S.], at 851." —— U.S., at ——, 50 U.S.L.W., at 4318. (emphasis added).

Appellees contend that the only question here is whether the function is traditional; accordingly, their motions are addressed solely to the question of traditionality.[5] (SAMTA Motion, at 9; APTA Motion, at 9). In *National League of Cities*, this Court ruled that the FLSA amendments are unconstitutional only "*insofar as they operate to directly displace* the states' freedom to structure integral operations in areas of traditional governmental functions," *National League of Cities, supra*, 426 U.S., at 852 (emphasis added).

Thereafter, this Court ruled in *Transportation Union* that the federal Railway Labor Act, addressing, as does the FLSA, state public employee labor relations, did not meet this standard. Accordingly, Appellees' argument, which would restrict the relevant inquiry here, cannot stand, must less support summary action by this Court.

Nor is *Transportation Union* distinguishable on the other grounds suggested by Appellees. For example, Appellees

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5. Appellees also completely ignore the difficult issue of the first prong of the *National League of Cities* test, as set forth in *Transportation Union*—the "states as states." *Cf., Community Communication Co. v. City of Boulder, Colo.*, —— U.S. ——, 102 S. Ct. 835 (1982).

assert that this Court's holding in *Transportation Union* is limited to railroads and merely represents a reaffirmation of this Court's preservation of the exemption for railroads in *United States* v. *California*, 297 U.S. 175 (1936), affirmed in *National League of Cities, supra*, 426 U.S., at 854 (SAMTA Motion, at 13; APTA Motion, at 26). This Court explicitly disclaimed such a limitation in *Transportation Union:*

> In concluding that the operation of a passenger railroad is not among those governmental functions generally immune from federal regulation under *National League of Cities*, we are not merely following dicta of that decision . . . —— U.S., at ——, 50 U.S.L.W., at 4317.[6]

This Court also specifically rejected Appellees' contention that *Transportation Union* rests on this Court's understanding of the Long Island Rail Road (hereinafter, "LIRR") as part of the interstate railroad system, in contrast to the local commuter transit sysem at issue here. (APTA Motion, at 27-28; SAMTA Motion, at 17, esp. n. 14). To the contrary, this Court ruled:

> The Court of Appeals undertook to distinguish the three railroad cases discussed in *National League of Cities*, noting that they dealt with freight carriers rather than primarily passenger railroads such as the Long Island. That distinction does not warrant a different result, however. Operation of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments. —— U.S., at ——, 50 U.S.L.W., at 4317.[7]

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6. In *Transportation Union*, APTA urged this Court to limit any reversal to an application of *United States* v. *California*. (APTA Amicus Br., at 6). However, as noted here, this Court explicitly refused to so limit its ruling.

7. In *Transportation Union*, APTA characterized the LIRR as having a "*de minimis* connection with interstate freight railroads"

(Footnote continued on next page)

Appellees further contend that, unlike the LIRR's conversion to public operation, the conversion of mass transit to public ownership is somehow distinguishable, allowing mass transit, but not the LIRR's commuter operations, to be considered traditional state functions.

In *Transportation Union*, this Court looked to "the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments", concluding, accordingly, that "federal regulation of state-owned railroads simply does not impair a State's ability to function as a State." —— U.S., at ——, 50 U.S.L.W., at 4317. This Court continued that, although it was not looking *only* to the past to determine constitutionality, the history of the undertaking in question plays a critical role in the inquiry "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence'." *Id.*, at 4317-18. This Court applied its test to conclude that where a function was historically provided by the private sector and, accordingly, subject to federal law, "there is *no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.*" *Id.*, at 4318 (emphasis added).

As set forth in Appellant's Suplemental Brief, the Congress first applied provisions of the FLSA to mass transit

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(APTA Amicus Br., at 6), being simply one "means selected by the state to perform [local public mass transit] service." (*Id.*). There, *amicus* APTA urged this Court, if it reversed *Transportation Union*, to make clear that its reversal rested on the narrow identity of the LIRR as a freight carrier in order to avoid "sweeping" local mass transit into the *Transportation Union* decision. (*Id.*) However, as noted, this Court declined Amicus APTA's suggestion to limits its reversal to freight railroads.

in 1961.[8] (Supp. Br., at 5-6). At that time, 95% of transit operations were private. (*Id.*). In 1967, a year after Congress applied overtime provisions of the FLSA to transit operations—public and private—90% of transit operations were still private. *APTA Transit Fact Book,* 1978-79.

In an effort to counter the statistics in the record of this case, which were published by APTA itself, APTA presents here for the first time statistics based on a new formulation of how the public nature of transit in past years should be measured: APTA takes the few cities with public transit and compares their population with the population of all cities of the same size. (APTA Motion, at 11, n. 14).[9] Even APTA's new measure cannot cover up the overwhelmingly private nature of mass transit in the past. For example, in 1932, APTA claims that 33% of the residents of cities with a population of or exceeding 250,000 were served by publicly owned transit. (APTA Motion, at 11). Yet APTA's own statistical sources reveal that the number of residents residing in cities served by publicly owned mass transit was less than 8% of the poulation of the United States at this time.[10] *Statistical Abstract of the United States* (hereinafter, "SAUS") Tables 9, at 10-12, Table 10 at 13, (66th ed. 1945-46). Even limiting the inquiry to

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8. Since at least 1937, transit labor relations had been subject to substantial federal regulation. Appellees do not dispute that private transit systems were subject since the 1930's to the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* which guaranteed transit workers collective bargaining or that Congress in enacting § 13(c) of the Urban Mass Transportation Act, 29 U.S.C. § 1609(c) intended to preserve the federal collective bargaining rights of transit employees.

9. APTA, which periodically publishes substantial statistical data regarding transit, including the public or private nature of § 13(c) of the Urban Mass Transportation Act, 29 U.S.C. § 1609(c), as a meaningful gauge of the public or private makeup of transit. *Compare,* APTA Transit Fact Book, 1978-9, at 38, 39.

10. Indeed, there is no evidence on record that any cities with populations under 250,000 had publicly owned mass transit before 1959. (APTA Br., at 11, n. 15.)

APTA's self-selected measure of cities of 250,000 or more, in 1932 only 4 of the 37 cities in the United States with a population of or exceeding 250,000 had publicly owned mass transit.[11]

Finally, Appellees fail entirely to dispose of the critical involvement of the federal government as a partner from the outset in the large scale public provision of transit services through the vehicle of the federal Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.* (hereinafter "UMTA").[12]

To cite just examples from the record here: (1) after the farebox revenue ceased providing San Antonio with sufficient funds to operate its transit system, the first public subsidies for transit in San Antonio came not from the state or locality, but from the federal government under UMTA (Garcia Jurisdictional Statement, at 8, 9); and (2) the costly commitments to the elderly and handicapped SAMTA outlines as being evidence of its local sovereign obligations (SAMTA Motion, at 6) are actually requirements of the federal transit spending laws, 49 U.S.C. § 1604(m).

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11. In 1960, when APTA maintains that 48% of residents of cities with a population over 250,000 had publicly owned transit, only ten of 51 cities in the United States with a population of 250,000 or more were served by publicly owned mass transit. SAUS, Table 10 at 15, Table 14, at 19, 20 (86th Ed. 1965). And in 1964, when Congress enacted the Urban Mass Transportation Act, 49 U.S.C. § 1601, *et seq.*, providing massive federal funding for mass transit, still only 16 of the 51 cities with a population of 250,000 or more had publicly owned mass transit. *Id.* This example of how APTA distorted the statistical record here only illustrates the necessity for plenary review here.

12. APTA's own source, *The History of Public Works in the United States,* 1970-1976 (1976) at 178, published by the American Public Works Association highlights the *critical federal role in mass transit*: "The unwillingness or inability of most state and local governments to take effective action eventually made the search for solutions the *responsibility of the federal government.*" (emphasis added).

Moreover, APTA certainly cannot avoid *Transportation Union* because the current administration has proposed reducing the federal commitment to mass transit. (APTA, Motion, at 18, n. 33). Not only has Congress failed to pass this proposal, which APTA apparently seeks to have this Court enact as a matter of Constitutional adjudication, the proposal itself reflects the overwhelmingly federal nature of public transit as it now stands, and has stood since the passage of UMTA in 1964.

C.

National League of Cities Does Not Preclude All Applications of the FLSA.

In the alternative, Appellees contend that, despite the broad severability clause of the FLSA, 29 U.S.C. § 219, absent Congressional enactment of a constitutionally valid amendment, application of the FLSA to mass transit is impermissible following *National League of Cities*. (SAMTA Motion, at 25-28, APTA Motion, at 28, 29). Generally, this Court does not resolve issues on which the lower courts have never ruled or which are not raised by an Appellant's jurisdictional statement, *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 386, n. 12, and the presentation of such issues is "regard[ed] with disfavor." *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 363, 371-72, n. 4. Certainly, on summary disposition, ruling on an issue neither decided by the district nor raised in the jurisdictional statement would be inappropriate. Neither *Fusari* v. *Steinberg*, 419 U.S. 379, (1975), nor *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406 (1977), cited by SAMTA (SAMTA Motion, at 25, n. 25), hold otherwise.[13]

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13. Even if this Court were to consider this issue, Appellees' contention, in the face of the FLSA's broad severability clause, 29 U.S.C. § 219, has no merit. First, well-established doctrines of *res judicata* and collateral estoppel preclude Appellees, who were fully represented in *National League of Cities*, from contending here that *National League of Cities* entirely forecloses enforcement of the

(Footnote continued on next page)

III.

CONCLUSION

For the reasons set forth herein, this Court should note probable jurisdiction.

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FLSA against non-traditional government functions on grounds of non-severability. *National League of Cities* v. *Marshall,* 429 F. Supp. 703, 705 (D.C.D.C. 1977) (3 Judge Court) (on remand, upholding the severability clause and rejecting the Plaintiffs' position that, as a result of the Supreme Court's decision, the FLSA was inapplicable to all state and local government employees).

Second, Appellees' own cases stand for the proposition that where a severability clause exists, there is a presumption in favor of severability. *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 312 (1936), *United States* v. *Jackson,* 390 U.S. 570, 585, n. 27 (1968). Here, Appellees have not overcome that presumption.

Third, since Congress enacted FLSA coverage of mass transit in 1961 and public transit employees in 1966 (Supp. Br., at 5, 6), Appellees' contention that Congress would not have intended coverage of transit to survive a ruling striking down some of the coverage of 1974 FLSA amendments is plainly wrong.